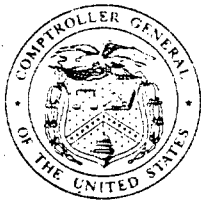


DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

9697

FILE: B-192579

DATE: April 3, 1979

MATTER OF: Metal Art, Inc. *DLG 00826*

*[Protest Concerning Offer Rejection and Award of Contract
To Original Equipment Manufacturer]*

DIGEST:

1. Noncompetitive award negotiated under public exigency exception to requirement for formal advertising is not legally objectionable under circumstances where Government is in out of stock position and item is critical.
2. Requiring activity's reliance on long standing policy position to procure "safety" spare part from original equipment manufacturer without making any effort to provide procedures to qualify alternative sources of supply is inconsistent with policy of DAR § 1-313 to procure spare parts on competitive basis where feasible. GAO recommends that requiring activity institute procedures to qualify alternative sources of supply.

Metal Art, Inc. (Metal Art) protests the rejection of its offer and an award to the original equipment manufacturer, Kunkle Valve Company, Inc. (Kunkle) under request for proposals (RFP) DLA 700-78-R-1586 issued by the Defense Logistics Agency (DLA). The RFP requested offers for 700 valve seats identified by three Kunkle part numbers. The valve seat is a component part of a relief valve.

Metal Art contends that it was entitled to award because its own valve seat is completely interchangeable with the Kunkle part and its price is lower than Kunkle's.

We find that the award, while it is not legally objectionable in this instance, was made in a restrictive environment engendered by the Navy, the requiring activity. We therefore are recommending that the Navy

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make every effort to institute procedures to qualify alternate suppliers with a view toward meeting its future requirements for these items through competitive procurements.

DLA suggests that the protest, filed after Metal Art learned of the award, is untimely. However, unlike DLA, we do not construe this protest as one against the use of the Kunkle part number in the purchase description. Therefore, contrary to DLA's assertion, Metal Art was not required to file its protest before the closing date for receipt of initial proposals. See 4 C.F.R. § 20.2(b)(1) (1978).

The contracting officer negotiated this procurement under the "public exigency" exception to formal advertising, 10 U.S.C. § 2304(a)(2) (1976), as implemented by Defense Acquisition Regulation (DAR) § 3-202.1 (1976 ed.). This authorizes negotiation of a contract if the public exigency will not permit the delay incident to formal advertising.

Although the RFP specified only Kunkle part numbers, it was issued to other potential offerors. Further, while it provided that "specifications, standards or drawings" were not available, offerors were also advised that an alternate item of a low offeror for which a technical evaluation required more than 30 days would be considered for future procurements.

Five offers were received; Metal Art was the second low offeror. Metal Art previously had furnished to DLA a drawing of the item it proposed to furnish. DLA forwarded that drawing to the Navy Ships Parts Control Center (NSPCC), which provides engineering support to DLA, for evaluation. NSPCC approved the Metal Art item as a "suitable alternative". However, that approval was subsequently rescinded when NSPCC learned of the Navy's policy, promulgated by the Naval Ship Engineering Center (NAVSEC), of restricting procurements of spare parts for the relief valve to the original manufacturer, Kunkle in this case. The DLA contracting officer then made award to Kunkle on the basis of the urgent requirements and the Navy's insistence that only Kunkle parts would be acceptable.

In view of the urgency involved--DLA was completely out of stock and the item is considered a critical one--we will not interpose any legal objection to the award. However, we believe the policy of the Navy in restricting these procurements to the original manufacturer has perpetuated, perhaps unjustifiably, sole source buys from Kunkle at premium prices. (For example, Kunkle's proposal price for this procurement was \$37.40 per unit; other prices received were \$14.35, \$19.20 (Metal Art's price), \$23.00 and \$33.00.)

The Navy's policy regarding the purchase of pumps, valves and their component parts evolved from a 1976 agreement between DLA's Defense Construction Supply Center (DCSC) and NAVSEC. This agreement allowed DCSC to use Navy-vendor drawings for Navy pumps, valves and component parts for formal advertisement or as a basis for making DCSC drawings. The agreement stated:

"It is agreed that, when data is missing or incomplete on a Navy or Navy-vendor drawing, DCSC may reverse engineer the original equipment manufacturer's part to obtain the required data and NAVSEC will accept the data, provided method of obtaining data is outlined and acceptable. DCSC will respect the prerogative of NAVSEC to request that a highly critical and complex part be procured sole source, providing the request is presented in writing and does not affect a previously competitive item."

DCSC's prior attempts to competitively procure relief valve parts have met with NAVSEC's insistence that these parts be purchased from the original equipment manufacturer. In an April 1976 letter to DCSC, NAVSEC stated:

"As to being identified as a safety type component, the relief valve occupies a unique functional position in system design. It is the singular device installed in a system to prevent an operational overload or other

abnormal condition from ultimately resulting in material destruction or personnel injury. Further, the fact that it does not become operational until abnormal and potentially dangerous system operational malfunctions occur, generally precludes the timely identification and correction of a defectively manufactured part. That is, unlike components such as pumps, regulating valves, turbines, etc, the relief valve is not a continuously, or even intermittently, operating component and a problem within the valve may very well remain unidentified until a catastrophic system casualty results due to the valve not being able to operate or operate properly."

Moreover, in a July 1978 document, NAVSEC stated:

"* * * This agreement evolved out of a recognition of the need for some components and spare parts to be procured from the original equipment manufacturer (OEM) because of unique technical requirements or critical end use application * * *. [S]hipboard relief valves represent a safety type component. Further, [the April letter] provided supportive rationale for procurement of all relief valve parts from the OEM only. In addition to replying to a DCSC request for approval of a discreet relief valve part, [the April letter] was intended to establish a policy position for future relief valve part procurements. Frequent DCSC requests continue to be received in NAVSEC for validation of relief valve part drawings for competitive procurement. Our response to these inquiries always references the position taken by [the April letter]. This letter reaffirms that position." (Emphasis supplied.)

The record indicates that DCSC has repeatedly attempted to secure NAVSEC's approval of relief valve part drawings for competitive procurements. However, NAVSEC has consistently denied DCSC's requests, citing the above agreement and the April 1976 letter. DLA believes that this amounts to a "predetermination" to limit competition for relief valves and their component parts to original manufacturers in all cases.

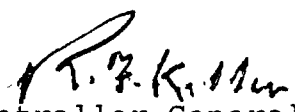
Although the Navy also cited prohibitive costs as an impediment to testing alternative sources, DLA reports that neither DCSC nor NAVSEC has made a cost determination regarding the acquisition of necessary data, testing and quality assurance measures.

DAR § 1-313 permits the procurement of spare parts from original manufacturers in appropriate circumstances. This regulation, however, does not justify sole source awards regardless of whether competition could be obtained through suitable testing of alternate items. The validity of any procedure which limits the extent of competition depends upon whether the restriction serves a bona fide need of the Government. Such restrictions include those essential to assure procurement of a satisfactory end product or to determine the high level of quality and reliability assurance necessitated by the criticality of the product. Department of Agriculture's use of Master Agreement, 54 Comp. Gen. 606, 609 (1975), 75-1 CPD 40 and 50 Comp. Gen. 542 545 (1971); 36 id. 809, 818 (1957). Basic characteristics of approved, although restrictive, procedures are that they function so that (1) no firm which is able to provide a satisfactory product is necessarily precluded from competing on procurements of that item; and (2) a firm may become eligible to compete at any time it demonstrates under suitable procedures that it is able to furnish an acceptable item which meets the Government's needs. Department of Agriculture's use of Master Agreement, supra, at 609.

Thus, while DAR § 1-313(c) allows a procuring activity to solicit only approved suppliers, it does not preclude the submission and consideration of proposals from unapproved sources which can otherwise qualify their products under suitable testing procedures.

Mercer Products & Manufacturing Co., B-188541, July 25, 1977, 77-2 CPD 45; 52 Comp. Gen. 546, 548-49 (1973). Indeed, DAR § 1-313 does not constitute a mandate to effect sole source awards regardless of the capability of producers which have not previously supplied the parts in question. Rotair Industries; D. Moody & Co., Inc., B-190392, December 13, 1978, 58 Comp. Gen. _____, 78-2 CPD 410. Reliability assurance and interchangeability of parts may be obtained through competitive negotiation procedures as well as from sole source buys from the original manufacturer. B-166435, July 1, 1969. Merely designating parts as "engineering critical", without regard to the willingness or ability of other sources to produce the parts, may perpetuate an unjustified sole source position. 50 Comp. Gen. 184 (1970).

Here, Metal Art's disqualification is not based on any specific evaluation of the items it would furnish or of its ability to furnish a reliable and interchangeable part. Rather, Metal Art's disqualification is based on the Navy's long standing policy to procure "safety" valve components from the original manufacturer, without providing adequate testing procedures to qualify alternative sources. Although the Navy suggests there would be some difficulty in devising an adequate test procedure, we are not convinced that a feasible testing procedure could not be developed. In view of the statutory requirement for competition, we think it is incumbent on the Navy to make every effort to develop this testing program. We are so recommending to the Secretary of the Navy.


Deputy Comptroller General
of the United States